

# The Grand Illusion

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An election is more like a balance sheet than a profit and loss account. It does not determine how much someone has won or lost over a certain period of time, but it refers to a specific key date: the first Tuesday in November every four years, according to century-old American constitutional law and custom. It determines whom you prefer *on this day*, regardless of whether you liked someone else better the day before or regret your choice the day after. If you want to vote early, you can, but nevertheless that is an information about your choice on election day. The election is a dot on the timeline, not a dash.

It is easy to lose sight of that, already in past elections, but in this one especially. You watch the news, follow the updates, listen to the pundits, much as if this was a sporting event: Constantly, things happen. One candidate “is leading” here, the other “has to fight” there, it’s all about winning terrain, there’s a finish line, one gets closer, the other catches up – the dot on the timeline is stretched into a line, the election appears like an event evolving over time, a string of events really, taut, charged, polarized: a competition. Which is an illusion, of course. All this fuss is about votes that have been cast already. The supposedly dramatic process is as undramatic as can be – checking, counting, tabulating, adding up numbers, no more exciting than the download bar on your computer screen. And yet we all keep sitting there, obsessively watching how this matter unfolds until the small hours, sizzling our brains with all that red and blue and Maricopa County and John King, unable to go to bed, and if we do, unable to fall asleep.

This year the supposed competition is particularly and literally endless, going on days on end, more test cricket than football really. But! What a thrill! Just watch how those blue and red poles are inching closer and closer together, how the contestants approach that magical goal of 270! How time stretches and stretches ever further, a crackling white-hot stretch of time, as taut and sensitive as our nerves during the pandemic! How charged it is with tension, how high the voltage! At some point it will have to discharge in one way or another, must end, that stretch of time, anything else would be unbearable.

This illusion of charging with tension the vote count was not Donald Trump’s idea, nor was the pandemic which makes it so protracted. But this sort of thing falls exactly into the very narrow range of what Donald Trump really knows about. The only thing that is not an illusion about him is his skills as a producer of so-called “reality TV”, i.e. of high-voltage illusion disguised as reality. That is what he literally does for a living. So he puts himself before a camera and conjures up another, even more exciting arc of suspense, a game behind the game, secret and conspiratorial machinations, postal votes that supposedly “appear” or “disappear” depending on where he is ahead or behind by a few thousand votes, and thus turns the illusionary competition turns into an illusionary crime story, and the sports event into a court-room drama.

But, look! The story does not catch. No-one buys it. Not even his own people, for the most part. The powerful Republican senators? Silence. Raised eyebrows even on Fox News. Where's the evidence? It will come, some say. But for now, there is none. So wait and see. But waiting and seeing is not exciting. The suspense escapes, the story deflates. The illusion gets thin and threadbare. And behind it, another arc of suspense shows itself.

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It spans more than 30 years, this arc of suspense. At the end of the 1980s, in the sunset of the Reagan era, Republicans understood that the rule of rich white men could not be defended in the long run by simply organizing majorities, for demographic reasons, and thus turned their attention to the so-called counter-majoritarian institutions, most of all the judiciary. That is where they must install their people, they realized, not some lukewarm middle-of-the-road bipartisan candidates, no, *their* people, loyal true believers who know what is expected from them, which is to punch holes, block and bring down whatever the majority will come up with to reform the ever more blatant injustice in the country from which they profit so much. This is what the Republicans have been telling themselves for 30 years, and during these last four years of the Trump administration they saw that a large part of that vision come true. So, what if Biden actually would win the Presidency – would that be so bad? What harm can he do anyway with the Senate and the Supreme Court against him? Let good old Joe suffer failure after failure for four miserable years. That's quite all right with us, we prefer small government anyway. Backing that story about fraudulent votes and going to court to snatch the Presidency away from Biden might be a risky and costly move, and why should we waste our political capital on the orange clown and his vulgar offspring when we can put it to better use without them? Let's rather all behave as models of institutional responsibility and restraint. We will be all the more credible when we deal with the things we really hold dear.

Ultimately, though, this arc of suspense is illusionary, too, of course, along with all the supposedly so innocent, supposedly so exceptional whiteness that it tries to defend and reproduce. Meanwhile, things do happen out there. People die. Forests burn. No matter what we tell ourselves. No matter how exciting we find them. It happens on its own glacial time scale, utterly regardless of our attention span. It is reality.

## This week on Verfassungsblog

[KIM LANE SCHEPPELE](#) explains Trump's strategy of using courts and Republican majorities in relevant state assemblies to stay in power even if he is voted out of office. The lawsuits looming in the background of the vote count is also the topic of our latest Corona Constitutional podcast episode (Nr 50, tada!), an interview with Boston-based lawyer [ANJA VON ROSENSTIEL](#) who worked on Joe Biden's campaign team.

[JUD MATHEWS](#) reports on the signals from the Supreme Court in the run-up to the election, in particular a concurring opinion by Justice Kavanaugh, which gives an impression of how far some on the bench would be prepared to go. [URSUS EIJKELENBERG](#) reflects on the consequences a favorable decision for Donald Trump would have: Not only would it delegitimize the court itself, but it would also plunge the USA into autocracy. Should the Democrats one day get the necessary majorities, however, [CULLEN O'KEEFE](#) has a proposal for them how they can use the threat of court packing to ensure that they do not have to implement it.

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Der Forschungsverbund „Normative Ordnungen“ an der Goethe-Universität Frankfurt am Main lädt ein zum Frankfurter Kolloquium für Internetforschung 2021

*Die nächsten Termine:*

**Do, 19.11.2020, 12-13.30 Uhr: Matthias Cornils (Mainz):** Medienaufsichtliche Plattform- und Intermediärregulierung in Deutschland: Chance, Hybris oder Symbolpolitik?

**Do, 17.12.2020, 12-13.30 Uhr: Julia Schütze (Stiftung Neue Verantwortung, Berlin):** Cyberangriff auf die Demokratie: EU und USA in Gefahr?

**Do, 21.1.2020, 12-13.30 Uhr: Maximilian Becker (Hannover):** Freiheit zur Rechtswidrigkeit im Internet: Herausforderungen technischer Rechtsdurchsetzung

**Do, 18.3.2021, 12-13.30 Uhr: Verena Haisch (DLA Piper und Deutscher Juristinnenbund e.V.):** Die Rolle des Rechts im Kampf gegen digitale Gewalt gegen Frauen – Theorie vs. Praxis

Anmeldung an PD Dr. Matthias C. Kettemann: [internetrecht@jur.uni-frankfurt.de](mailto:internetrecht@jur.uni-frankfurt.de)



Informationen und weitere Termine: [normativeorders.net/internetforschung](https://normativeorders.net/internetforschung)



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In Germany, like everywhere else, the **Covid-19** “lockdown” is back. [THORSTEN KINGREEN](#) is annoyed by the fact that the Bavarian regulator has apparently not noticed that it’s not just freedom of religion and assembly which enjoys the status of a fundamental right, but artistic freedom, too. [JOHANNES GALLON and ANNA KATHARINA MANGOLD](#) highlight the often overlooked duty of the state to protect life and physical integrity. [ANDREA KIESSLING](#) finds much to dislike about the current plans of the Federal Government to amend the legal basis for the Covid-related measures in the Infection Protection Act and make them more litigation-proof.

[NYASHA WEINBERG and JOELLE GROGAN](#) list eight principles of rule of law and good governance that have proven themselves during the Covid-19 crisis in Europe.

[TOMER KENNETH](#) analyzes a report by Freedom House, according to which the pandemic is being used by many governments to engage in **disinformation** and undermine democratic values.

The situation in **Poland** after the scandalous verdict of the “Constitutional Tribunal” on abortion, and the massive protests that has stirred, remains a topic this week. [ALEKSANDRA KUSTRA-ROGATKA](#) muses that populism and popularity don’t go hand in hand in Poland in these days. [JAN MUSZYŃSKI](#) describes how much of the predicament in which the PiS government now finds itself has to do with the politicization of the court which it itself brought about so brutally.

This week’s **Rule of Law** podcast episode was also about Poland, but as well about Hungary, Ireland and Germany. LENNART KOKOTT talks to [ATTRACTA O’REGAN](#), [ANNA KATHARINA MANGOLD](#), [GÁBOR ATTILA TÓTH](#) and [JAKUB URBANIK](#) about legal education and who controls what future judges, prosecutors, lawyers and civil servants learn at university.

[DANIEL THYM](#) takes a critical look at the EU Commission's comprehensive proposal for **asylum law reform**, especially with regard to the prevention of so-called secondary migration.

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the Verfassungsblog team*

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Fighting continues between Armenia and Azerbaijan, and unlike the Crimean referendum in 2014, the international community is limiting itself in the conflict over **Nagorno-Karabakh** to demanding a ceasefire. [POLINA KULISH](#) and [KRISTINA LIER](#) attribute the different treatment in the two cases to different doctrines of the international right to self-determination.

In **Chile**, after a successful referendum, the current constitution from the times of the Pinochet dictatorship will be replaced by a new one. [FRANCISCA MOYA](#) and [MARCO GOLDONI](#) warn against over-constitutionalization in view of the pressing social issues in the country.

In the **United States**, Republicans and Democrats can at least in principle agree on one thing: it can't go on like this with the internet behemoths. [MIKE GODWIN](#) warns about false dichotomies in the dispute whether or not social media operators should be held liable for the content on their platforms, which might unwillingly cement the dominance of Facebook even more in the end. In his view, neither carriers nor publishers are the right comparison, but rather something in between – say, bookstores.

Facebook shows different job offers to women than to men, and no, you can't just blame the algorithm for this. [WIEBKE FRÖHLICH](#), many years ago our first intern here at Verfassungsblog, is now returning as an author with an article on discriminatory **gender targeting**, which we think is great.

[RALF MÜLLER-TERPITZ](#) examines how Germany deals with the EU law obligation to introduce **upload filters** to protect copyright and considers the regulation found to be a good compromise.

In **Finland**, a cyber attack on psychotherapeutic patient data with subsequent ransom demands has demonstrated how vulnerable the digital infrastructure in the

healthcare sector can be. [SUSANNA LINDROOS-HOVINHEIMO](#) analyses the case from a data protection perspective.

*Jochen Schlenk has contributed to this weekly review.*

Right, that's it for this week, I guess. Please remember that to do all this we need your support. There is this great platform named [Steady](#) on which you can take out a kind of voluntary subscription, which is a fantastic way to help keeping us afloat. But of course we also gladly accept one-off payments via Paypal ([paypal@verfassungsblog.de](mailto:paypal@verfassungsblog.de)) or bank transfer (IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF).

All the best,

Max Steinbeis

